72-728

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-728

AUGUST K. BERGENTHAL,
PETITONER,

v.

ELMER CADY, WARDEN OF WISCONSIN STATE PRISON, WAUPUN, WISCONSIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

October Term, 1972

No.

AUGUST K. BERGENTHAL,
PETITONER,

v.

ELMER CADY, WARDEN OF WISCONSIN STATE PRISON, WAUPUN, WISCONSIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, August K. Bergenthal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the U. S. Court of Appeals for the Seventh Circuit.

Opinions Below

The opinions of the Court of Appeals and of the District Court appear in the Appendix as Exhibits A and B, pp. 17 and 21.

Jurisdiction

The denial on May 6, 1971, of the petition for a writ of habeas corpus by the U. S. District Court for the Eastern District of Wisconsin was affirmed on August 16, 1972, by the U. S. Court of Appeals, Seventh Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the trial Court's refusal upon request to order disclosure of the results of an examination of Petitioner by a State psychiatrist and of the latter's potential testimony, both withheld by the prosecution, constitutes such a suppression of material evidence favorable to Petitioner as violates due process of law.
2. Whether, when coupled with the evidence suppressed, the prosecutor's final argument was so replete with prejudicial and false statements as to result in an unfair trial in violation of due process of law.

Constitutional Provisions Involved

Fifth Amendment, U. S. Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Fourteenth Amendment, U. S. Constitution:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Statement of the Case

In a bifurcated Wisconsin state trial the jury convicted Petitioner of first degree murder and endangering safety by conduct and then rejected his defense of insanity, for which convictions Petitioner on April 14, 1969, received a sentence of life imprisonment and a consecutive sentence of up to five years' imprisonment, respectively. The Wisconsin Supreme Court affirmed the conviction. *State* v. *Bergenthal*, 47 Wis. 2d 668, 178 N.W. 2d 16 (1970), *cert. denied*, 402 U.S. 972 (1971).

On January 25, 1971, Petitioner petitioned the District Court for a writ of habeas corpus, Exhibit C, p. 27, seeking an evidentiary hearing based *inter alia* upon the prosecutor's suppression of material evidence favorable to the defense and the prosecutor's prejudicial final argument. Without holding a hearing the Court on May 6, 1971, denied the writ, partly predicated upon the Court's misconception that the prosecutor disclosed the evidence at trial, whereas the uncontroverted fact is that the disclosure of suppressed evidence came only after the trial. *Bergenthal* v. *Cady*, 326 F. Supp. 848 (E.D. Wis. 1971), *aff'd*, No. 71-1479 (7th Cir. August 16, 1972).

At the sanity trial nine defense witnesses, including three experts, testified that Petitioner was legally insane when the crimes were committed. When the prosecutor rested without offering any evidence on this issue, the Court called three experts who, after a cursory examination of Petitioner's medical records and of Petitioner for two and a half hours, testified that Petitioner was sane when the offenses were committed more than six months earlier.

The prosecutor had retained a psychiatrist, Dr. William J. Crowley, who examined Petitioner, but did not offer his evidence. The Court denied Petitioner's request to call Dr. Crowley for an adverse examination as a State agent or

employee pursuant to a Wisconsin statute. The Court further denied a defense request to call Dr. Crowley as a defense witness in rebuttal of the court-appointed experts' testimony for the limited purpose of establishing his employment by the State in this case. Petitioner also made timely oral and written motions for an order requiring the prosecutor to disclose Dr. Crowley's opinion of Petitioner's sanity. Without any hearing held or even any in camera disclosure by the prosecutor made either before or during trial as to the contents of Dr. Crowley's potential testimony, the trial Court flatly rejected the defense requests. Not until *after* conviction did the prosecutor reveal to the Court or the defense that this State expert could not have disputed the opinions of the defense experts. The sole indication of what Dr. Crowley's testimony would have been is his affidavit appearing in Petitioner's brief below and reproduced herein as Exhibit E, p. 37.

Reasons for Granting the Writ

I. Explication of Brady v. Maryland by this Court Is Necessary to Prevent Trial Courts from Suppressing Requested Evidence in Ignorance of What They Suppress and to Prevent Appellate Courts from Shifting to the Defense a Heavy Burden of Proof that Evidence so Suppressed Is Favorable to the Defense.

The fact that the prosecution revealed its psychiatrist's views only *after* conviction was misunderstood by the District Court, conceded by the State on appeal and criticized by the Court of Appeals on the ground that in a criminal justice system properly administered the State would make full disclosure before trial or at trial by court order, citing ABA *Standards Relating to Discovery and Procedure Before Trial* §§ 1.2 and 2.1(a)(iv) and commentary at 67, 73-

78 (Approved Draft, 1970). Conceding that this suppression of evidence "was at the peril of depriving petitioner of his *Brady* rights," the Court held that "we are unable to say that neutral or no opinion evidence on the critical issue of petitioner's sanity is favorable evidence within the meaning of the due process guarantees of *Brady*," which holds that:

> the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution . . .
>
> A prosecution that withholds evidence on demand of an accused which, if made available, would *tend* to exculpate him or reduce the penalty . . . does not comport with standards of justice . . .
>
> *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963) (emphasis supplied).

This holding below not only ignores that an evidentiary hearing would more fully develop the testimony suppressed, but it also ignores additional testimony that the expert could give. The defense was precluded from calling Dr. Crowley by the trial Court's ruling that the defense would be bound by his surprise testimony which the Court itself had suppressed. But after the trial the defense learned that in addition to his inability to form an opinion to a reasonable medical certainty as to Petitioner's sanity, Dr. Crowley would have been able at least to testify: that he made a psychiatric evaluation of Petitioner and attended the entire "sanity" trial assisting the prosecutor; that one of the most important factors in evaluating Petitioner's sanity was his [and by extension all court-appointed experts'] lack of opportunity to see Petitioner right after the offenses; that a defense expert who testified had an

advantage over *all* other experts, in that he had [almost thirteen] years of [repeated] contact with Petitioner before the offenses and saw him fairly soon after; that Petitioner was at all times frank and candid and was at no time guilty of "malingering." Exhibit E, p. 37.

Neither Court below approved suppression of this evidence as irrelevant or immaterial. The trial Court refused to order disclosure of Dr. Crowley's testimony when, except for realizing that the defense wanted to know what the prosecution wanted kept secret, the Court literally did not know what evidence it was suppressing. Since its ruling cannot therefore be based on any rational determination that this evidence could not help the defense, the Court has forfeited any deference normally due a trial court's determination.

The Court of Appeals based its decision on its inability to say that the suppressed evidence was favorable to the defense. But Dr. Crowley's *medical* conclusion that Petitioner was truthful and not malingering was obviously favorable to the defense. And his *medical* conclusion that a defense psychiatrist's years of relationship with Petitioner and contact with him soon after the offenses gave him an advantage over *all* other experts was quite favorable to the defense. Any objective evidence tending to bolster the testimony of defense experts over that of the court-appointed doctors could have proved very helpful to the defense, as the post-trial comment of a juror implies. Exhibit F, p. 40. Dr. Crowley's status as a State employee would commend his conclusions even more forcibly to the jury. His testimony could have crucially benefited the defense, which here had the burden of proof, in its effort to tip the scales in a case which without this evidence is evenly balanced, as the prosecutor admitted in final argument, between three defense experts and three court-appointed experts:

> . . . you heard three psychiatrists say that he was insane and you heard three psychiatrists say that he was sane at the time. Say, well, fifty-fifty, I don't know; I don't know if he was sane or insane. . . .
>
> . . . What about the evidence on the issue of insanity? It's pretty split; very definite split. . . .
>
> . . . I was required to prove nothing . . . . If you . . . say I don't know if he was sane or insane . . . the presumption is that he was sane at the time and he has not carried his burden of proof . . . . [D]on't buy any educated guess for reason. [Tr. 3085, 3086, 3131]

If Dr. Crowley's testimony were as innocuous as the District and Appeals Court hold, why did the prosecutor bother to suppress it and stubbornly resist repeated defense efforts to call him to the stand? It is anomalous at best to see appellate courts characterize as innocuous evidence which the prosecutor was so concerned to persuade the Court to suppress.

In *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967), this Court observed that it had not decided whether the prosecutor's constitutional duty to disclose extends to all admissible evidence useful to the defense and what degree of prejudice necessitates a new trial. This Honorable Court should speak to this issue not merely to correct the error of characterizing the above evidence as not favorable to the defense but also to direct trial courts not to decide such questions *in vacuo* without hearing the evidence and to prevent appellate courts from shifting to the defense a heavy burden of proof that such suppressed evidence is helpful to the defense.

The decision below is tantamount to a holding of harmless error which falls short of the standard that:

> before a federal constitutional error can be held harmless, the court must be able to declare a belief that it

was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

Similarly in this close case "[a] new trial is required if the false testimony [here the suppressed evidence] . . . *may* have had an effect on the outcome of the trial," *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959) (emphasis supplied); *Giglio* v. *United States*, —— U.S. ——, 92 S. Ct. 763, 766 (1972). The Court of Appeals holding was in effect an attempt to answer the jury question whether the evidence was sufficiently favorable to the defense to have changed the verdict; but the question should rather be, as in *Napue*, whether the evidence *may* have influenced the jury. Thus upon a defense request for information the onus should shift to the prosecutor.

This Honorable Court should further explicate *Brady* as follows. Upon a timely defense request for *Brady* testimony the trial court must when feasible hold an adversary evidentiary hearing so that the defense may develop fully in that context and forum the value to the defense of all relevant evidence. Failing such an adversary proceeding at trial, the applicable test should then be as follows. Upon a timely defense request for *Brady* evidence the prosecutor must satisfy the trial judge that reasonable men could not disagree that the evidence could not help the defense; otherwise the suppressed evidence must be disclosed to the defense. The Court of Appeals holding that it is unable to say the evidence is favorable to the defense places on the defense the unworkable and unfair burden of proving the helpfulness of evidence which by definition the prosecutor is attempting to conceal from the defense.

In *Giles* v. *Maryland*, *supra*, the Court reversed and remanded on the *Brady* principle even where the withheld information was not requested by the defense (hardly the

case here) and even where the admissibility of some of the withheld information was questionable:

> . . . The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, *generously conceived*, to the case, *including all possible defenses.*
>
> . . . The information was specific, factual, and concrete, although *its implications may be highly debatable* . . .
>
> *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (concurring opinion of Justice Fortas).

Where deliberate suppression follows defense requests putting prosecutor and Court on notice of the value of this evidence to the defense, the standard of materiality should be lower than where no request was made. "The request cases also stand on a special footing; the prosecution knows of the defense's interest and, if it has failed to honor this even in good faith, it has only itself to blame." *United States* v. *Keogh*, 391 F.2d 138, 147, 148 (2d Cir. 1968). *Cf. Moore* v. *Illinois*, —— U.S. ——, 92 S. Ct. 2562, 2567-2569 (1972).

Brady as applied below puts appellate courts in the untenable position of speculating whether evidence which could have aided the defense would have in fact done so. This perilous situation would not arise under the proposed refinement, which would leave evidence which could help the defense in the strategic lap of defense counsel for submission to the jury, where it belongs. It is manifest folly

to force appellate courts to toss such evidence onto a scale which has long since tipped one way.

II. When Coupled with Suppression of Evidence, a Prosecutor's Improper and False Statements in Final Argument Can Violate Petitioner's Right to Due Process of Law.

The State conceded on appeal that "[i]nstances of improper argument occurred in the course of the district attorney's summation." Brief for Respondent-Appellee, p. 9. At the outset Petitioner concedes that admitted improprieties which do not reach constitutional due process dimensions do not entitle him to habeas corpus relief. The precise issue is whether the prosecutor's argument, in conjunction with his suppression of evidence, deprived Petitioner of his liberty without due process of law.

The prosecutor's final argument was replete with improprieties, many of which relate to the suppressed testimony discussed above. The prosecutor invoked the Deity twenty-seven times in final argument, seventeen times in the guilt phase and ten times in the insanity phase of the bifurcated trial.

The prosecutor himself testified in final argument over a dozen times, of which the following are examples:

> . . . Obviously, it's clearcut, in my opinion, first degree murder case — [Objection sustained, Tr. 1828] . . . . Mrs. Wirth is the longest cross-examination I have seen in 5 years in a courtroom — for five years in the courtroom — [Tr. 1833] . . . You believe Paula if you wish; that's your opinion. I have very, very strong doubts [Tr. 1853] . . . . What happened in my opinion was simply this [Tr. 1855] . . . . He takes it out on the wife; . . . God knows, I have done it myself many,

> many times [Tr. 3094-3095] . . . . And don't be fooled by that word "sanitarium" . . . . Poor guys that get drunk go over in the tank overnight or out to the House of Correction for 5 or 10 or 20 days or a hundred days. That's what happens to poor guys that get drunk. But if you have got a big wallet — [Objection sustained, Tr. 3099] . . . . Frankly, ladies and gentlemen, I have never even heard of a case where 15 or 16 doctors were involved. I have never even heard of it. [Objection sustained, Tr. 3102].

The prosecutor made at least a dozen false statements or misrepresentations of the evidence in final argument, including repeated references to the court-appointed experts as State doctors, of which the following are examples:

> . . . . She's shot through the leg, and counsel would have you believe that it doesn't mean anything that she had an embolism. Do you know what a pulmonary embolism is? That means that the scab of the inside scab from that leg went up to her lungs and she almost — "Mr. Steinle: (Interposing) — Just a moment, Your Honor, I object to that as not being a fair statement of the evidence on the basis of what the sergeant himself said." "The Court: Counsel, it is apparent to the Court that you are arguing outside of the evidence." [Tr. 1865] . . . . And all three of the doctors called by the State indicated that the defendant was a chronic alcoholic [Tr. 3096] . . . . No temporary type of insanity is a defense in this; [Tr. 3103] . . . . And then the defendant kind of drops out — and the doctors basically agree — the State's doctors . . . that at that time when the defendant got the note that he really got distressed [Tr. 3108] . . . . . and he gives vent to them [agressive drives]; and the three

> doctors for the State testified that he didn't have to; that he did have the substantial capacity. [Tr. 3113] . . . . Doctors for the State testified that even on those bases this was how a chronic alchoholic in an emotional state would act [Tr. 3117].

The prosecutor's repeated emphasis upon the status of the court-appointed experts as the "impartial experts" demonstrates that the above references to them as "state doctors" were intentional:

> . . . . The doctors called by the Court — not by the State, Ladies and Gentlemen — the Court appointed panel [Tr. 3087] . . . . [H]e goes beyond — way beyond any of the five doctors . . . . let's review his description; the impartial expert; the impartial expert called by the Court [Tr. 3092-3093] . . . . Three out of 3 appointed by this Court . . . testified that in their opinion the defendant was not insane. These men are impartial experts. They're the Court's witnesses. They're not hired by the district attorney. The district attorney hired a doctor, and you saw him sit here; a doctor from the County Hospital sat with me and consulted with me during cross-examination [Tr. 3101-3102] . . . . [I]t was the three called by the Court — it was 3 out of 3; and through analysis was the same diagnosis — chronic alcoholism [Tr. 3102] . . . . Keep in mind several things. That the 3 impartial experts called by the Court universally agreed that this defendant was sane [Tr. 3129] . . . . [C]onsider those 3 impartial experts; the only ones that sat through the whole trial and heard all the evidence; not hired by the State; not hired by the defendant; . . . consulting only with their conscience and the oath they took before God and this Court to make a fair and

> adequate examination [Tr. 3130] . . . . Don't buy this insanity nonsense. You have got three impartial experts called by this Court qualified [reciting at length the three doctors' qualifications, Tr. 3119].

The prosecutor falsely implied in final argument that if Dr. Crowley had testified he would have supported the State's position:

> The only evidence that was put — the State didn't put on any evidence. We wanted you to hear what the independent psychiatrists had; not my psychiatrist or not the defendant's psychiatrists and psychologists but what did that independent panel have to say. That's what's important . . . . [Tr. 3121]

The prosecutor falsely implied in final argument that twelve to thirteen defense experts were not called because they would have testified in support of the State's position when he knew [from examining notes and records of defense experts] that their involvement was mostly supportive of the testifying phychiatrists and their testimony would have been merely cumulative:

> He put on 3 doctors here—3 doctors. Remember I asked him about the doctors that he saw. I read off a list. Dr. Hurley—you saw Dr. Hurley on the stand. Dr. Black—did anybody see Dr. Black. Dr. J. E. Weber—did anybody see Dr. Weber.... [The prosecutor continued in similar fashion naming a total of 15 doctors and questioning the absence of each one that did not testify.] You heard 3 doctors out of some 15 or 16 that the defendant contacted and dealt with. You heard 3 doctors testify that in their opinion he was schizophrenic reaction. Three out of 3 came in—3 out of 3

of the expert witnesses came in and testified. [The prosecutor then went on to contrast the findings.] [Tr. 3100-3101]

It is a denial of due process to deceive court and jury by known perjured testimony, *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), even if it relates only to the credibility of the state's key witness, *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), or not to correct a false impression created by a witness telling only part of the whole truth, *Alcorta* v. *Texas*, 355 U.S. 28 (1957).

Knowing that the only State expert, Dr. Crowley, did not and could not testify in support of the State's position, the prosecutor nonetheless argued that "the State didn't put on any evidence" but "wanted you [the jury] to hear what the independent psychiatrists had ... to say" in such a way as to *falsely* imply that the State could have produced its expert to give further evidence in support of the State's position but out of fairness and extreme deference to the jury the State chose to rely solely upon the opinions of the "fair and impartial" court-appointed experts. But not only did Dr. Crowley not support the State position, he would have given other testimony favorable to the defense, to the effect that Petitioner was uniformly candid and that the expert in the best position to evaluate Petitioner was a defense expert. Here the prosecutor did not merely fail to call Dr. Crowley and in argument remain silent as to his availability, leaving the jury to speculate on his preference for "fair and impartial" experts; rather the prosecutor actively misrepresented Dr. Crowley's availability and affirmatively implied a fact and trial tactic situation which did not exist.

Where the prosecutor wished to contrast the testimony of hirelings with that of "impartial experts," he well remembered that the court-appointed experts were "not hired by

the State." But elsewhere when he deemed it advantageous the prosecutor repeatedly falsely referred to these experts as "all three of the doctors called by the State," "the State's doctors," "the three doctors for the State," and "Doctors for the State." The prosecutor's failure to call a State doctor was a fact he could hardly forget because of his undoubted frustation that he could call no expert to testify for the State. This falsity, intentionally repeated and directly contrary to the truth he elsewhere asserted, is all the more crucial to the conviction in view of a juror's post-trial statement:

> After hearing the three doctors appointed by the Court, since they were the Court's doctors, we had to go along with them. (Exhibit F, p. 40).

The State on appeal did not deny that the prosecutor argued outside the evidence and made repeated false statements and misrepresentations but merely baptised them as "fair comment." The Seventh Circuit apparently agreed that argument by way of false statement going to the crux of the issue is within the "limits of the leeway given counsel." But this Court should recognize that these are foul blows which the prosecutor constitutionally is not at liberty to strike.

A single deliberate falsehood was sufficient in *Miller* v. *Pate,* 386 U.S. 1 (1967), to reverse a conviction where the prosecutor referred to painted shorts as blood-stained. Is the cumulative constitutional violation any less for the prosecutor to call upon God almost as another State witness twenty-seven times, to argue false evidence, falsely to imply that defense experts not called to the stand would have testified for the State, to take false credit for the court-appointed experts as "State doctors" and falsely to imply that Dr. Crowley who had sat with and assisted the prosecu-

tor through the trial would have testified on behalf of the State's position but for the prosecutor's forebearance to guild the lily in view of the dispositive testimony of "impartial experts"? Such argument must be viewed in conjunction with the prosecutor's suppression of the testimony of Dr. Crowley favorable to the defense (*Cf. Pyle* v. *Kansas*, 317 U.S. 213, 216 [1942]) and in light of the prosecutor's own admission of a fifty-fifty split of evidence on an issue upon which Petitioner here bore the burden of proof. The cumulative impact of such tactics was surely devastating. In view of the "totality of the circumstances" Petitioner's rights under the Fourteenth Amendment due process clause have been violated. *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968).

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 71-1479 SEPTEMBER TERM 1971—APRIL SESSION 1972

AUGUST K. BERGENTHAL,
PETITIONER-APPELLANT,
v.
ELMER CADY, Warden of Wisconsin State Prison, Waupun, Wisconsin,
RESPONDENT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 71-C-33
MYRON L. GORDON, *Judge.*

ARGUED APRIL 19, 1972 — DECIDED AUGUST 16, 1972

Before DUFFY and MURRAH,* *Senior Circuit Judges* and JUERGENS,** *District Judge.*

MURRAH, *Senior Circuit Judge.* This is an appeal from the denial of a petition for a writ of habeas corpus in the district court. *Berganthal* v. *Cady,* 326 F.Supp. 848 (E.D. Wis. 1971). In a bifurcated Wisconsin state trial the jury first found petitioner guilty of first degree murder

* Senior Circuit Judge Alfred P. Murrah of the Tenth Circuit is sitting by designation.

** Chief District Judge William G. Juergens of the Eastern District of Illinois is sitting by designation.

and a related offense and then rejected his defense of legal insanity at the time of the commission of the crimes. The Wisconsin Supreme Court affirmed the convictions. *State* v. *Bergenthal*, 47 Wis.2d 668, 178 N.W.2d 16 (1970), *cert. denied*, 402 U.S. 972 (1971). Numerous grounds were raised in support of the petition for the writ, but the district court segregated and analyzed only the allegations involving issues of constitutional significance. Finding no basis for factual dispute concerning the asserted federally protected rights, the court denied the writ without an evidentiary hearing. We affirm.

On appeal petitioner contends that he was entitled to an evidentiary hearing on a number of interrelated issues, only two of which are worthy of note: (1) the suppression of favorable evidence in violation of Fourteenth Amendment due process rights under *Brady* v. *State of Maryland*, 373 U.S. 83 (1963); and (2) prejudicial remarks to the jury by the state prosecutor amounting to a denial of due process.

The essential facts are not in dispute. At the trial on petitioner's sanity, nine witnesses—including three experts—called by the defense testified that petitioner was legally insane at the time of the commission of the crimes. Three experts appointed by the court testified that he was not legally insane. The prosecution apparently had petitioner examined by a psychiatrist, but did not offer his evidence. Petitioner's request for the opinion of the psychiatrist was denied and the trial court apparently refused to order the state to produce it. At a post-conviction hearing, however, the prosecution disclosed, for the first time, that its psychiatric expert had been unable to form an opinion regarding petitioner's sanity.

Undoubtedly it would have been good practice and in the interest of proper administration of criminal justice for the state to fully and freely inform the defense before

trial of the result of the psychiatrist's examination, including any report made, and, failing to do so, for the state trial court to require the production of such result or report on request. *See* ABA Project on Standards for Criminal Justice, *Standards Relating to Discovery and Procedure Before Trial* §§ 1.2 and 2.1(a)(iv) and commentary at 67, 73-78 (Approved Draft, 1970).

Brady holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra* at 104. We may assume that the withholding of the result of the examination and the refusal of the court to order disclosure upon request was at the peril of depriving petitioner of his *Brady* rights. In the circumstances of this case, however, we are unable to say that neutral or no opinion evidence on the critical issue of petitioner's sanity is favorable evidence within the meaning of the due process guarantees of *Brady* and related cases. *See generally Giles* v. *State of Maryland*, 386 U.S. 66 (1967); *United States ex rel. Durso* v. *Pate*, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971).

Conduct of state prosecutors asserted by federal habeas corpus petitioners to be unfair and prejudicial has consistently been held to fall short of constituting a denial of due process. *See, e.g., United States ex rel. Colon* v. *Follette*, 366 F.2d 775 (2d Cir. 1966); *United States ex rel. Castillo* v. *Fay*, 350 F.2d 400 (2d Cir. 1965); *Jackson* v. *People of California*, 336 F.2d 521 (9th Cir. 1964); *Lotz* v. *Sacks*, 292 F.2d 657 (6th Cir. 1961); *United States ex rel. Kirk* v. *Petrelli*, 331 F.Supp. 792 (N.D. Ill. 1971); *United States ex rel. Chase* v. *Rundle*, 266 F.Supp. 487 (M.D. Pa. 1967). Here the district court examined the allegedly prejudicial remarks and agreed with the state

Supreme Court's conclusion that the arguments were within the "limits of the leeway given counsel." We cannot say, over the judgment of the state Supreme Court and the federal trial court, that these statements were of such gravity as to constitutionally deprive petitioner of a fair trial. *See Sampsell* v. *People of California*, 191 F.2d 721, 725 (9th Cir. 1951), *cert. denied*, 342 U.S. 929 (1952).

It thus becomes manifestly apparent that an evidentiary hearing was neither necessary nor warranted to determine the facts essential to the consideration of the constitutional issues presented, and that the court did not err in refusing to grant one. *See Townsend* v. *Sain*, 372 U.S. 293 (1963); *Van Ermen* v. *Burke*, 398 F.2d 329 (7th Cir. 1968).

On appeal petitioner complains, for the first time, that the district court should have ordered him to file a traverse to respondent's return. This procedural point was never presented to the district court and comes too late. But even if timely, we find it totally without merit. A traverse to respondent's return is a permissive pleading under 28 U.S.C. § 2243, and no court order is necessary. *See* Rule 81(a), Fed. R. Civ. P.

AFFIRMED.

APPENDIX B

326 Federal Supplement 848

AUGUST K. BERGENTHAL,
PETITIONER,
v.
ELMER CADY,
Warden,
RESPONDENT.
No. 71-C-33.

United States District Court,
E.D. Wisconsin.
May 6, 1971

Habeas corpus proceeding by state prisoner. The District Court, Myron L. Gordon, J., held, inter alia, that no evidentiary hearing was required on claim that alleged impartial expert in fact was employee of state.

Petition denied.

[suggest omitting material in brackets]

Gimbel, Gimbel & Boyle, by Gerald P. Boyle, Milwaukee, Wis., for petitioner.

Robert P. Warren, Atty. Gen. for Wisconsin, by Sverre O. Tinglum, Asst. Atty. Gen., Madison, Wis., for respondent.

DECISION and ORDER

MYRON L. GORDON, District Judge.

The petitioner seeks a writ of habeas corpus with respect to his two convictions in the state court on April 6, 1969. He was found guilty of murder and endanger-

ing safety by conduct regardless of life. The convictions were affirmed by the Wisconsin supreme court in *State* v. *Bergenthal*, 47 Wis.2d 668, 178 N.W. 2d 16 (1970).

[1] A petition for writ of certiorari was filed on Mr. Bergenthal's behalf in the United States Supreme Court on November 30, 1970; the issue raised in that application deals with the unconstitutionality of § 957.27 Wis. Stats. The exhaustion doctrine does not require that Mr. Bergenthal have applied for certiorari to the United States Supreme Court before making the instant application for a writ of habeas corpus in this court. *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963). See also Hunter, Post Conviction Remedies, 50 F.R.D. 153, 168.

[2] Mr. Bergenthal's present petition was filed in this court on January 25, 1971. In an order dated February 2, 1971, I directed the respondent to file a return. Thereafter, a briefing schedule was established, and the petitioner's brief was timely filed. The respondent's brief, however, was not filed on the date it was due, but, instead, it was filed three days late. Because there have been previous difficulties in this regard, I deemed it necessary to reject the tardy submission on the part of the respondent. It has been placed in the file but has not been read or considered in connection with this order. I advised counsel for both sides that the respondent's brief was not going to be considered by the court; thus, no reply brief was submitted by the petitioner.

The ground rules applicable to habeas corpus applications in this court on the part of state prisoners are reasonably clear, but their application is often difficult. 28 U.S.C. § 2254(a) permits a federal habeas corpus application on the part of a state prisoner to be entertained only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Habeas corpus, however, is not available to

correct non-jurisdictional errors which do not render the trial constitutionally unfair. *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In *Townsend*, at pages 311-312, 83 S.Ct. at page 756, the United States Supreme Court observed:

> "The whole history of the writ—its unique development—refutes a construction of the federal court's habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution."

Thus, while the federal district court is not to act as a court of appellate review after state convictions, there is a duty to weigh the alleged violation of federal rights. The United States Supreme Court recently commented in *Kaufman* v. *United States*, 394 U.S. 217, 225, 89 S.Ct. 1068, 1073, 22 L.Ed.2d 227 (1969):

> "• • • federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial. See, *e. g.*, *Mancusi* v. *DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); *Carafas* v. *LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); *Warden Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); see also *Henry* v. *Mississippi*, 379 U.S. 443, 452, 85 S.Ct. 564, 570, 13 L.Ed.2d 408 (1965)."

It has been held that when a state prisoner seeks fed-

eral habeas corpus, he is entitled to an evidentiary hearing when "the merits of the factual dispute were not resolved [at] the state hearing." *Townsend*, page 313, 83 S.Ct. at page 757. See also *Zurita* v. *United States*, 410 F.2d 477 (7th Cir. 1969). On the other hand, where there has been fact-finding, on the record, by the state court, it is not mandatory that the district court conduct an independent evidentiary hearing on the issues raised by the petition. *Van Ermen* v. *Burke*, 398 F.2d 329 (7th Cir. 1968), *cert. denied*, 393 U.S. 1004, 89 S.Ct. 494, 21 L.Ed.2d 468 (1968).

The petition now before the court lists 25 grounds in support of the application. Many of such grounds, however, are closely inter-related, and they are not advanced as independent bases for the relief sought. Ground (a) is a generalized statement that petitioner was not given a fair trial. Ground (b) urges that the jury should have been given an opportunity to find guilt in lesser degrees. The latter issue was amply considered and resolved adversely to the petitioner by the state supreme court. See *State* v. *Bergenthal*, 47 Wis.2d 668, 674, 178 N.W.2d 16 (1970).

A large number of the itemized grounds relate to alleged improprieties occurring in connection with the use of expert testimony. It is charged that these were errors committed in calling the independent psychiatrists to testify and also in regard to the definition of "insanity." It is also alleged that § 957.27 Wis.Stats. is unconstitutional. These matters were fully considered by the Wisconsin supreme court at pages 682-688, 178 N.W.2d 16 of its opinion, and I find nothing in the moving papers to justify a re-examination of those issues. In my opinion, they raise no substantial issues of fact calling for an evidentiary hearing in this court.

[3] Thus, for example, in ground (k), it is charged

that "one of the alleged impartial experts, to-wit: Dr. Nemeth, was in fact an employee of the plaintiff, State of Wisconsin, at all times material hereto." Even if it were true, it would not be a controlling factor; was the trial judge partial because he too was an employee of the state? In my opinion, the allegation falls far short of meeting the *Townsend* standard that federal habeas corpus is designed to review the "gravest allegations" that "fundamental liberties" of the petitioner have been violated. No evidentiary hearing is needed because the fact, even if fully established, could not have tainted the conviction.

[4] The petitioner also urges that his rights under *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), were violated by reason of the fact that a Dr. Crowley, a psychiatrist engaged by the state, examined the defendant but was not called to testify. The prosecution advised the trial court that Dr. Crowley was not called to testify because he had not formulated an opinion as to Mr. Bergenthal's sanity. While it may be arguable that the court should have permitted the defense to explore the details as to Dr. Crowley's views, it cannot properly be said that this constituted a violation under *Brady* v. *Maryland;* the existence of the evidence (or perhaps, more accurately, the absence thereof) was disclosed by the prosecutor. At worst, there may have been a discretionary error by the trial judge, but it cannot be said that there was any "suppression by the prosecution of evidence favorable to an accused." See *Brady,* at p. 87, 83 S.Ct. at p. 1196.

The petitioner also charges that the prosecutor made inflammatory and prejudicial statements before the jury. I have examined those statements and agree with the state supreme court's conclusion that the arguments were within

the "limits of the leeway given counsel." 47 Wis.2d at page 682, 178 N.W.2d at page 24.

[5] Mr. Bergenthal also complains that he was not permitted to cross-examine an attorney who had been retained by members of the victim's family. The trial judge quashed a subpoena served upon such attorney, and the supreme court noted at pages 677-678, 178 N.W.2d 16 of its opinion that the questioning of such counsel would have invaded the area of privileged communications. There is nothing in the instant petition which contradicts such finding. The petitioner has not submited any basis whatsoever for this court's conducting a further inquiry into this claimed irregularity.

I find that Mr. Bergenthal has not submitted any basis for this court's believing that there has been an intrusion upon any of his federally protected rights. In addition, under the standards noted above, there are no pending legal or factual issues which require an evidentiary hearing in this court.

Now, therefore, It Is Ordered that the petition for habeas corpus be and hereby is denied.

APPENDIX C

[1] UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

Case No. 71-C-33.

August K. Bergenthal,
Petitioner,
vs.
Elmer Cady, Warden of Wisconsin
State Prison, Waupun, Wisconsin,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS.

The petitioner, August K. Bergenthal, by his attorneys, Gerald P. Boyle, Francis R. Croak and Franklyn M. Gimbel, respectfully shows to the Court and alleges as follows:

1. The jurisdiction of this Court is invoked under 28 U.S.C., Section 2241, to release the prisoner from the custody of the respondent, which custody is in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. That the petitioner is a citizen of the State of Wisconsin and of the United States of America.

3. That the petitioner is imprisoned and restrained of his liberty in the Wisconsin State Prison at Waupun, Wisconsin, by the respondent, Warden of the State Prison at Waupun, Wisconsin.

4. That the cause of the imprisonment and detention of the petitioner is the result of an Order of the Honorable Hugh R. O'Connell, Circuit Court Judge for Milwaukee County, Wisconsin, which Order was in the nature of a sentence imposed by the said Judge on the 14th day of April, 1969, wherein the petitioner was sentenced to life imprisonment and five (5) years consecutively for the

crimes of first degree murder and endangering safety by conduct regardless of life.

5. That your petitioner had cause to appeal the judgment of the Circuit Court of Milwaukee, Wisconsin, to the Supreme Court of the State of Wisconsin; and that Court, in June of 1970, affirmed the Order and judgment of the Circuit Court of Milwaukee County, Wisconsin, and subsequently denied your petitioner's motion for a rehearing of that appeal.

6. That all State remedies have been exhausted and that your petitioner does hereby invoke jurisdiction of this Honorable Court as a result thereof.

7. That your petitioner has reason to believe, and does believe, that his continued incarceration is illegal and unconstitutional and in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution on the following grounds:

(a) That the petitioner was not given a fair trial by the Circuit Court of Milwaukee County, and as such, his constitutional rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution were violated.

(b) At his trial, the Circuit Court of Milwaukee County refused to allow the jury hearing the case to consider any other verdict than that of first degree murder when the evidence presented at the trial could have been the basis of a finding of some crime other than first degree murder.

(c) That the trial court refused to allow an expert summoned by the defense to examine evidence procured by the defense, and as a result, rendered that expert's opinion a nullity.

(d) That the petitioner had entered a plea of not guilty by reason of insanity and had three psychiatrists testify that at the time in question, he was insane within

the confines of the American Law Institute definition of "insanity."

(e) That the overwhelming testimony at the time the defense rested on that issue was that the defendant was insane and should have been found, without more, to be insane at the time of the commission of the acts in question, and therefore, not guilty by reason of insanity as a matter of law.

(f) That the State of Wisconsin was then in a position to call upon witnesses to rebut the proof which the defendant offered to substantiate his burden of proof but chose not to offer any evidence whatsoever and the defendant's burden of proof stood uncontradicted.

(g) That the Court at that time should have directed a verdict of not guilty by reason of insanity.

(h) That the Court refused to do so and proceeded to call expert witnesses appointed by itself to testify as to the mental competency of the petitioner at the time of the commission of the acts in question.

(i) That the Court appointed those experts pursuant to statute, but the experts examined the petitioner for a sum total of two and one-half hours.

(j) That one of the court appointed experts, to-wit: Dr. Edward Sheehan, completely misinterpreted the American Law Institute definition of "insanity" but regardless, his adverse opinion to the petitioner was made known to the jury.

(k) That upon information and belief one of the alleged impartial experts, to-wit: Dr. Nemeth, was in fact an employee of the plaintiff, State of Wisconsin, at all times material hereto.

(l) That the jury heard each of the court appointed doctors testify as to their impartiality, that they were appointed by the Court, and that they took an oath to make and render a fair and impartial opinion, those questions

being asked of the witnesses by the Court in the presence of the jury.

(m) That as a result the petitioner's constitutional rights to a fair and an impartial jury trial were violated by the Court's informing the jury that the doctors were appointed by the Court and also were fair and impartial.

(n) That Section 957.27, Wisconsin Statutes, is unconstitutional in that it renders a fair and impartial jury trial impossible and violates the due process clause of the Fourteenth Amendment of the United States Constitution.

(o) That the State of Wisconsin, through the District Attorney, had present at the trial, a psychiatrist, one Dr. William Crowley; that he, in fact, examined the defendant, that he was assisting the State of Wisconsin, and that he was to testify but was never called by the State.

(p) That pursuant to *Brady* v. *Maryland*, the opinion of Dr. Crowley should have been made known to the defense because his opinion, even if he could not reach one, may have tended to exculpate the defendant's involvement in the commission of the acts in question.

(q) That a demand as to Dr. Crowley's opinion was made by the defense, but the same was denied by the Court.

(r) That the State of Wisconsin, on sixteen (16) occasions in closing arguments, utilized the opinions of the court appointed experts to rebut the presumption of insanity brought forward by the defense.

(s) That that fact rendered a fair and impartial trial impossible, and that the State acted unfairly in using the opinions of the court appointed experts to rebut the presumption of insanity.

(t) That to allow the State to use court appointed experts to its advantage is a violation of due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

(u) That upon resting without producing any evi-

dence whatsoever, the State rendered the use of defense experts a nullity in that the statute in question was designed to cover only situations where experts testify for both sides of the parties in the lawsuit, but in the case at bar, three court appointed experts were called by the Court to testify even in view of the fact that the State rested its case on this issue without calling a witness.

(v) That the jurors, because of the actions of the Court, had to accept the testimony of the Court's experts (see attached Affidavit, marked Exhibit —).

(w) That the closing arguments of the State, both in the first and second phases of the trial, were inflammatory and prejudicial.

(x) That the confession made by the petitioner was taken during the time when he was psychotic according to the credible testimony, and, therefore, should not have been admitted into evidence; but if admitted into evidence, the confession must be taken in its entirety, and the confession clearly indicated that the petitioner was involved in a struggle at the time of the acts in question, and therefore, a jury should have had the right to consider something other than first degree murder.

(y) That the petitioner should have been found not guilty by reason of insanity as a matter of law and committed to a mental hospital as opposed to being sentenced to a State prison.

Wherefore, your petitioner prays that this Court:

A. Allow the petitioner to file this Petition.

B. That a Writ of Habeas Corpus issue forthwith, directed to the respondent, requiring him to release the petitioner, and that the respondent be required, within three (3) days, to make return, in writing, answering the allegations of this petitioner.

C. That the petitioner be forthwith released without bail pending disposition of this proceeding for a Writ of

Habeas Corpus; that after a full and complete hearing, this Court release the petitioner from the custody of the respondent.

D. That the Court grant petitioner such other and further relief as the Court, from time to time, may find just and appropriate for the protection of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

E. That the matters herein are issues of fact and of law requiring and commanding that the petitioner be present for the hearing.

Dated at Milwaukee, Wisconsin, this 25th day of January, 1971.

(s) GERALD P. BOYLE
GERALD P. BOYLE
One of the attorneys for petitioner, August K. Bergenthal

APPENDIX D

UNITED STATES DISTRICT COURT.

* * (Caption—71-C-33) * *

RESPONDENT'S RETURN.

Respondent Elmer Cady by Robert W. Warren, Attorney General, and Sverre O. Tinglum, Assistant Attorney General, his attorneys, for return to the petition for a writ of habeas corpus herein, admits, denies and alleges as follows:

1. Denies that respondent's custody of petitioner is in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as alleged in paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. Admits the allegations of paragraph 4 of the petition, and further certifies that the true cause of petitioner's detention is the judgment of the Circuit Court for Milwaukee County, Wisconsin, a certified copy of which is annexed hereto as Exhibit 1.

5. Admits the allegations of paragraph 5 of the petition.

6. For answer to paragraph 6 of the petition, admits that all of the allegations of paragraph 7 of the petition, with the exception of subparagraphs 7 (k) and 7 (x), were presented to and decided by the Wisconsin Supreme Court when petitioner was there, but alleges that only the allegations appearing in subparagraph 7 (n) of the petition were presented to the Wisconsin Supreme Court in the context of a claimed denial of a relevant right guaranteed by the laws or Constitution of the United States; alleges that as to all other allegations of paragraph 7 of the petition, the same were presented and argued to the Wisconsin Supreme Court as alleged errors upon the trial without any claim of federal constitutional significance; denies that petitioner

has exhausted his state remedies with respect to such allegations.

7. For answer to paragraph 7 of the petition, denies that petitioner's detention is illegal or unconstitutional, and with respect to the allegations of the subparagraphs of said paragraph 7 denies that the errors therein claimed to have been committed by the state trial court describe (with the exception of subparagraph (n)) any deprivation or impairment of any of petitioner's relevant right guaranteed under the laws or Constitution of the United States;

(a) Denies the allegations of subparagraph 7 (a) of the petition.

(b) Admits that the state trial court refused to submit any verdict other than first degree murder; denies that any other verdict could reasonably have been submitted.

(c) Admits the allegations of subparagraph 7 (c) of the petition, but alleges that the trial court ruling rested on adequate discretionary grounds.

(d) Admits the allegations of subparagraph 7 (d) of the petition.

(e) Denies that defense testimony relating to petitioner's insanity was "overwhelming," and alleges that said testimony was in no wise binding on the trier of fact, the same being admittedly predicated upon the truthfulness of statements made to defense psychiatrists by the petitioner.

(f) Admits that the prosecution was free to call witnesses and introduce evidence when the defendant rested and that the prosecution rested without offering any proof, but denies that petitioner's "burden of proof" stood uncontradicted.

(g) Denies the allegations of subparagraph 7 (g) of the petition.

(h) Admits the allegations of subparagraph 7 (h) of the petition.

(i) Amits the allegations of subparagraph 7 (i).

(j) Denies that Dr. Edward Sheehan "completely misinterpreted" the ALI definition of insanity; admits that Dr. Sheehan's opinion was made known to the jury; alleges that any demonstrated misinterpretation of a definition by Dr. Sheehan would affect only the weight of his testimony, and not its admissibility.

(k) Admits the allegations of subparagraph 7 (k).

(l) Admits the allegations of subparagraph 7 (l).

(m) Denies the allegations of subparagraph 7 (m) of the petition.

(n) Denies the allegations of subparagraph 7 (n) of the petition.

(o) Admits the allegations of subparagraph 7 (o) of the petition, but alleges that the prosecutor was informed by Dr. Crowley that he had formed no opinion as to petitioner's sanity; alleges that the prosecution was in any event not obliged to call Dr. Crowley as a witness.

(p) Denies the allegations of subparagraph 7 (p) of the petition; alleges that petitioner was free to call Dr. Crowley as a witness for the defense, but that petitioner did not do so.

(q) Admits the allegations of subparagraph 1 (q) of the petition; alleges that petitioner was free to call Dr. Crowley as a witness for the defense, but that petitioner did not do so.

(r) Admits that the prosecutor utilized the opinions of court appointed experts to a substantial degree in closing arguments.

(s) Denies the allegations of subparagraph 7 (s) of the petition.

(t) Denies the allegations of subparagraph 7 (t) of the petition.

(u) For answer to subparagraph 7 (u) of the petition, denies that the prosecution's failure to call witnesses on

the insanity issue "rendered the use of defense experts a nullity," and alleges that the trier of fact remained free to accept as true the testimony of defense experts; denies the remainder of the allegations of subparagraph 7 (u) of the petition, alleging that the interpretation placed upon the statute by the Wisconsin Supreme Court is in conflict with petitioner's contentions, and that the Wisconsin Supreme Court's interpretation is controlling here.

(v) Denies the allegations of subparagraph 7 (v) of the petition.

(w) Denies the allegations of subparagraph 7 (w) of the petition.

(x) Denies the allegations of subparagraph 7 (x) of the petition; alleges that petitioner's confessions and statements were reliably found, after full hearing by the State Trial Court, to be voluntary and trustworthy and hence admissible; further alleges that petitioner made no objection to the introduction of said confessions and statements in evidence at time of trial, and that failure to object was the product of a deliberate strategy on the part of defense counsel.

(y) Denies the allegations of subparagraph 7 (y) of the petition.

Wherefore, respondent prays that this petition be dismissed, with costs to respondent.

Dated at Madison, Wisconsin, this 2nd day of March, 1971.

ROBERT W. WARREN,
Attorney General,

/s/ SVERRE O. TINGLUM,
SVERRE O. TINGLUM,
Assistant Attorney General.

APPENDIX E

AFFIDAVIT OF WILLIAM J. CROWLEY, M.D.

STATE OF WISCONSIN
COUNTY OF MILWAUKEE, ss:

William J. Crowley, being first duly sworn upon oath hereby deposes and says as follows:

1. That he is a duly licensed physician in the State of Wisconsin and a certified psychiatrist; that he is the Clinical Director of the Milwaukee County Mental Health Center-North Division and a staff member at Milwaukee County General Hospital; and that he has been practicing psychiatry for ten years.

2. That in 1969 he was retained as an expert prosecution witness for the trial of August K. Bergenthal; that in this capacity he sat through the entire "sanity" portion of the trial assisting the district attorney, E. Michael McCann; that he made a psychiatric evaluation of Mr. Bergenthal prior to the trial and that in addition to observing him at the trial also conducted a subsequent interview during the week that the "sanity" portion of the trial was in progress; that throughout all of these proceedings he wavered back and forth between the defense position and the state position and in the final analysis he determined that he was unable to form an opinion to "a reasonable medical certainty" upon the ultimate question.

3. That in his professional opinion about 95% of the phychiatric evaluation by all experts testifying at the trial was in agreement, that is as to Mr. Bergenthal's problems, how he was dealing with them and how they influenced his life; that he felt that it was a 50-50 or 49-51% situation so that the fairest thing to do was to abstain from stating an opinion.

4. That at the time he was retained by the prosecution he informed Mr. McCann that his professional opinion might or might not support the state's position; that Mr. McCann advised him that if this opinion were in agreement with the defense experts he would so advise the court.

5. That one of the most important factors in evaluating the mental state of Mr. Bergenthal at the time of the offense was that the affiant did not see him immediately afterward (after the offense).

6. That if he had been called as a witness at the trial, he would have testified that Dr. Hurley had an advantage over all other experts—defense, court-appointed and state—in that he had years of contact with the patient before the incident and he saw him fairly soon after.

7. That in all of his observations of Mr. Bergenthal, it was his professional opinion that Mr. Bergenthal was at all times frank and candid in his answers to questions and at no time was guilty of "malingering" and he would have so testified.

8. That in the course of preparation for the trial he read transcripts of the priest's testimony, transcripts of his interrogation and police notes to the effect that the priest thought Mr. Bergenthal was probably in a psychotic state but that such a psychotic state if present might well have been produced by conditions other than schizophrenia, or even any state which would properly be classified as a mental disease or defect.

9. That he is aware that this affidavit is made to be used in the course of Mr. Bergenthal's appeal process; that he has not up until now testified as to his opinion nor given any affidavit as to what it was.

Dated at Milwaukee, Wisconsin, this 5th day of August, 1971.

/s/ William J. Crowley, M.D.
William J. Crowley, M.D.

Subscribed and sworn to before me this 5th day of August, 1971.

/s/ Genevieve M. Hauf,
Genevieve M. Hauf,
Notary Public, Wisconsin.

My Commission Expires April 20, 1975.

APPENDIX F

AFFIDAVIT OF ROBERT HACKETT

Robert Hackett, an attorney licensed to practice in the State of Wisconsin, being first duly sworn on oath, deposes and says:

That he was an attorney retained by one August K. Bergenthal along with attorney Roland Steinle, Jr., and Gerald P. Boyle, to defend the said Bergenthal against criminal charges brought by the State of Wisconsin against Bergenthal in March and April, 1969.

That after the said Bergenthal was convicted and sentenced to state prison at Waupun, and after his appeal was heard by the Supreme Court of Wisconsin in June of 1969, he, Robert Hackett, was discharged from any further service on behalf of the said Bergenthal. Sometime thereafter, in the latter part of the summer of 1969, he had occasion to be in a restaurant cocktail lounge known as Brothers II on North Downer Street in the City of Milwaukee. At that time a male person approached Robert Hackett and greeted him. When Mr. Hackett asked him who he was he mentioned his name and said he was a juror in the Bergenthal murder case. A general discussion ensued and when Mr. Hackett related a question to the juror about the defense counsels' concern over why the jury took so short a period of time to arrive at its verdict of sanity, the juror in question replied, "After hearing the three doctors appointed by the Court, since they were the Court's doctors, we had to go along with them."

.....

ROBERT HACKETT

Subscribed and sworn to before me this .... day of ...., 1971.

.....

Notary Public, Milwaukee County, Wisc.

My commission is permanent.

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(7th Cir., 1949), 176 F. 2d 579,
cert. dism. 338 U.S. 809, 94 L.Ed. 489,
70 S.Ct. 49 16

United States Constitution:

Fourteenth Amendment 2,15,20

United States Statutes:

28 U.S.C. §1254 (1) 1

United States Supreme Court Rules:

Rule 19 6

Wisconsin Statutes, 1967:

Section 957.11 (1) 3

(2) 3

957.27 3,9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-728

AUGUST K. BERGENTHAL,
Petitioner,

v.

ELMER CADY, Warden of
Wisconsin State Prison,
Waupun, Wisconsin,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is contained in Appendix A to the petition herein. The opinion of the United States District Court for the Eastern District of Wisconsin is contained in Appendix B to the petition and is reported in 326 F. Supp. 848.

JURISDICTION

This Court's jurisdiction is sought to be invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. When the state district attorney did not call a psychiatrist as a witness during the sanity portion of the petitioner's state court bifurcated trial because the psychiatrist had been unable to form an opinion about the petitioner's sanity at the time of the commission of the crimes and when the defense, which was aware that the psychiatrist had been retained by the state after the commencement of the trial, had examined the petitioner and had been present at the sanity portion of the trial, could have done so, did the state trial court's refusal of a defense motion to order the district attorney to disclose whether the psychiatrist had an opinion and, if so, what that opinion was, constitute a suppression by the state of material evidence favorable to the petitioner in violation of the Due Process Clause of the Fourteenth Amendment?

II. Was the content of the district attorney's final arguments to the jury such that the petitioner was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

The petitioner was charged in the Circuit Court of Milwaukee County, Wisconsin, with the crimes of first-degree murder and attempted first-degree murder. These crimes occurred on September 20, 1968. The petitioner entered pleas of not guilty and not guilty by reason of insanity. A bifurcated trial was held before a jury. After the first portion thereof, which lasted twelve days and included six night sessions, the jury found the petitioner guilty of first-degree murder and of endangering safety by conduct regardless of human life.

Thereafter, the sanity portion of the trial commenced. Prior to the trial and in accordance with the then existing Wisconsin law as set forth in *State v. Shoffner* (1966), 31 Wis. 2d 412, 427, 143 N.W. 2d 458, the petitioner filed a written waiver of the provisions of sec. 957.11 (1) and (2), 1967 Wis. Stats., and elected to be tried under the American Law Institute definition of insanity. This choice placed the burden of proof on the insanity issue on the petitioner.

The petitioner hired and was examined by twelve psychiatrists. He had also been examined by three psychiatrists who had been appointed by the court as impartial expert witnesses in accordance with and under the provisions of sec. 957.27, 1967 Wis. Stats. A psychiatric evaluation was also made by Dr. William J. Crowley, a psychiatrist who subsequently, after the commencement of the trial, had been retained by the state and at its request sat through the sanity portion of the trial assisting the district attorney.

At the commencement of the seven-day and five-night sanity portion of the trial, the defense presented the testimony of three of the twelve psychiatrists it had hired. Each of these testified that in his opinion the petitioner was insane at the time of the commission of the crimes under the ALI

definition of insanity. The three impartial court-appointed psychiatrists thereafter testified. Each of them stated that in his opinion the petitioner was sane at the time of the commission of the crimes under the ALI definition of insanity.

After the defense had rested and before the testimony of the impartial experts appointed by the court, the state had an opportunity to present evidence on the sanity issue. It chose not to do so.

When the state rested without calling any witnesses, defense counsel, outside the presence of the jury, made an oral motion to the court and indicated that he would be reducing that motion to writing. Defense counsel pointed out that Dr. Crowley, whom he described as an experienced and astute expert witness of the highest professional integrity, had been retained by the state after the commencement of the trial, that he had sat through the sanity portion of the trial and that he had not been called by the state as a witness. Defense counsel moved for an order of the court compelling the district attorney to disclose why Dr. Crowley had not been called as a state's witness, whether Dr. Crowley had an opinion on the sanity of the petitioner at the time of the commission of the crimes and, if so, what that opinion was. Defense counsel argued that he had a right to such information on the basis of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215, and the ethical responsibilities of a prosecuting attorney. The district attorney indicated that he had no objection to an *in camera* discussion between Dr. Crowley and the court. The court, however, decided that it would reserve its ruling until it had received and considered the written motion of defense counsel.

The trial before the jury continued with the testimony of the impartial expert witnesses. Before that testimony was

completed, the written motion was received and ruled on by the court. The court, finding that *Brady v. Maryland,* supra, was inapplicable and that the district attorney had no ethical obligations to call witnesses because the defense wanted him to, refused to order the district attorney to answer the questions posed by defense counsel. The court indicated that the defense was free to call Dr. Crowley as a witness if it desired to do so. The defense also asked that it be allowed to call Dr. Crowley adversely on the basis of a statute relating to civil actions only. The trial court, and subsequently the Supreme Court (47 Wis. 2d 668, 688), held that the statute involved was completely inapplicable to criminal actions.

The defense did not call Dr. Crowley.

After the defense and the state rested, oral arguments were made and the court instructed the jury. The jury found that the petitioner was not insane at the time of the commission of the crimes.

The defense made motions after verdict and during the course of them the district attorney revealed that he had not called Dr. Crowley as a witness because Dr. Crowley had been unable to form an opinion to a reasonable medical certainty on the petitioner's sanity at the time of the commission of the crimes. Petitioner's Appendix E, which is an affidavit subsequently procured by the defense from Dr. Crowley, also so indicates. The trial court denied the motions after verdict and judgment was entered. The petitioner was sentenced to life imprisonment on the first-degree murder conviction and to not more than five years imprisonment on the conviction for endangering safety by conduct regardless of human life.

The petitioner appealed from the judgment of the circuit court to the Wisconsin Supreme Court. He asserted many alleged errors to that court, including the two raised in this petition. The Wisconsin Supreme Court unanimously affirmed the judgment. *State v. Bergenthal* (1970), 47 Wis. 2d 668, 178 N.W. 2d 16. A motion for rehearing was made and denied.

Thereafter, a petition for certiorari to the Wisconsin Supreme Court was filed with this Court. In *that* petition the questions now raised in *this* petition were not even presented. Certiorari was denied. 402 U.S. 972.

Prior to the denial of certiorari, a petition for a writ of habeas corpus was filed with the United States District Court for the Eastern District of Wisconsin. Petitioner's Appendix C. The multiple claims made to the district court included the two contained in this petition. The district court denied the petition for a writ of habeas corpus, finding that the claims here presented were meritless and did not entitle the petitioner to relief. Petitioner's Appendix B and *Bergenthal v. Cady* (E.D. Wis., 1971), 326 F. Supp. 848.

The petitioner appealed the denial of his petition by the district court to the United States Court of Appeals for the Seventh Circuit. On August 16, 1972, that court affirmed the district court. Petitioner's Appendix A.

ARGUMENT

There is no reason why certiorari should be granted in this case. None of the considerations governing review on certiorari as set forth in Rule 19 of the United States Supreme Court Rules here exist.

I. This Case Provides No Basis For Explication Of Brady v. Maryland Because Brady Is Completely Inapplicable.

The petitioner asserts that certiorari should be granted because this case affords an opportunity to explain and expand upon the holding in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215. It does not. *Brady* is completely inapplicable to the fact situation here presented.

A. Twelve state and federal court judges have unanimously found Brady inapplicable hereto.

The state trial court judge, both on the original trial motion and on motions after verdict, found *Brady* inapplicable. The seven justices of the Wisconsin Supreme Court so found. 47 Wis. 2d 668, 687, 688.* The federal district court judge rejected the petitioner's *Brady* argument as did the three judges of the United States Court of Appeals for the Seventh Circuit. Appendix B, p. 25, and Appendix A, p. 19. All were unanimous and all were correct.

B. They were clearly correct in so concluding.

In *Brady,* Justice Douglas, expressing the views of the majority of the court, wrote (373 U.S. 87):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

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*There is no mention of *Brady* in the opinion, but *Brady* was argued as a basis for the claim of error rejected by the Wisconsin Supreme Court on pages 687, 688 of its opinion.

Brady was subsequently discussed by this Court in *Giles v. Maryland* (1967), 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737, and in the recent case of *Moore v. Illinois* (1972), — U.S. —, 92 S.Ct. 2562, — L.Ed. 2d —. In *Moore* the opinion of the Court was delivered by Justice Blackmun. He explained the *Brady* holding by writing (92 S.Ct. 2562, 2568):

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured."

In order for *Brady* to apply to the present case, (a), (b) and (c) listed above must all exist. Here none of them do.

1. There was no "suppression" of evidence by the district attorney.

At the time defense counsel moved that the trial court order the district attorney to reveal why he had not called Dr. Crowley as a state's witness and what, if any, opinion Dr. Crowley had on the sanity of the petitioner at the time of his commission of the crimes, defense counsel knew that Dr. Crowley had examined his client; he knew that after the commencement of the trial the state had retained Dr. Crowley; he knew that Dr. Crowley had sat through the sanity portion of the trial; he knew that Dr. Crowley was not called as a state's witness and he knew Dr. Crowley, whom he described to the trial court as an "experienced and astute expert witness" "of the highest professional integrity."

The defense has no right to demand that the state call any particular witness. *Gaertner v. State* (1967), 35 Wis. 2d 159, 166, 150 N.W. 2d 370; *People v. Fisher* (1962), 208 Cal. App. 2d 78, 25 Cal. Rptr. 242; *People v. Jolliff* (1964), 31 Ill. 2d 462, 202 N.E. 2d 506. As pointed out by the Wisconsin Supreme Court in this case, the state chose to rest on the sanity issue without calling any witnesses and, "It had a right to do so." *State v. Bergenthal* (1970), 47 Wis. 2d 668, 688, 178 N.W. 2d 16, cert. den. 402 U.S. 972.

Instead of calling any expert witnesses, the state, in pursuit of justice, was willing to and did place its reliance on the testimony of the three impartial expert witnesses appointed by the court. These witnesses owed no duty or allegiance to either side. *Jessner v. State* (1930), 202 Wis. 184, 231 N.W. 634; *State v. Bergenthal* (1970), 47 Wis. 2d 668, 684, 178 N.W. 2d 16, cert. den. 402 U.S. 972. See also, sec. 957.27, 1967 Wis. Stats. The three impartial expert witnesses all testified that, under the ALI test of insanity, the petitioner was sane at the time of the commission of the crimes.

In order for the district attorney to "suppress" evidence, that evidence must be unknown or unavailable to the defense. Here, the defense knew that Dr. Crowley could be called as an expert witness and he was available to be called by the defense, if it so desired. Under these circumstances, the trial court correctly found that the district attorney had not "suppressed" any evidence. Cf: *In re Curtis* (D.C. D.C., 1941), 36 F. Supp. 408; *State v. Clarke* (1967), 36 Wis. 2d 263, 279, 280, 153 N.W. 2d 61, cert. den. 393 U.S. 861, and *Clarke v. Burke* (7th Cir., 1971), 440 F. 2d 853, cert. den. 404 U.S. 1039. See also, *Riley v. Sigler* (8th Cir., 1971), 437 F. 2d 258, in which it was held that an FBI report was not "suppressed" when the existence of the report was known by the accused.

A claim comparable to that made in this petition was presented and rejected in *Gollaher v. United States* (9th Cir., 1969), 419 F. 2d 520, cert. den. 396 U.S. 960. In *Gollaher*, it was asserted that there was a *Brady* violation because the government did not call at the trial two witnesses (Knapton and Morgan) who had testified before the grand jury. The defense, despite its request, was not permitted to see the grand jury testimony of those witnesses. It argued that since the government did not call the witnesses at the trial there was an implication that their testimony would have been helpful to the defense. The defense did not desire to call them as defense witnesses for fear that they could be impeached by use of their grand jury testimony. The federal district court and the Ninth Circuit Court of Appeals found *Brady* to be inapplicable to that state of facts. The court of appeals, p. 527, wrote:

> "Appellants were in a much different position in this case. *They could have called Knapton and Morgan to testify.* Brady could not have called Boblit to testify for Boblit had a right to refuse to be called. Further, it is apparent that Brady and his attorney were deceived. This is not true in the present case. *Appellants knew where to find the testimony they felt may have been helpful in their defense and could have used it subject to the risk of impeachment."* (Emphasis added.)

Here also the defense knew where to find the testimony that it allegedly thought might have been helpful to it. The defense could have called Dr. Crowley as its witness. It chose not to because it did not wish to be bound by the testimony of an expert, whom it described as a man "of the highest professional integrity." The district attorney did not "suppress" any evidence. The existence of that evidence was known to and available to the defense, just as

was the testimony of the nine remaining psychiatrists who had been hired by the defense and were not called by it to testify. On this subject see the comment of the Wisconsin Supreme Court in *State v. Bergenthal* (1970), 47 Wis. 2d 668, 688, 178 N.W. 2d 16, cert. den. 402 U.S. 972.

2. The lack of an expert opinion is not evidence of a "favorable character."

On motions after verdict, the district attorney revealed that he did not call Dr. Crowley as a witness because Dr. Crowley was unable to form and had no opinion on the sanity of the petitioner at the time of the crimes. Appendix A, p. 18; *State v. Bergenthal* (1970), 47 Wis. 2d 668, 687, 688, 178 N.W. 2d 16, cert. den. 402 U.S. 972. See also, Appendix E, p. 37.

The federal district court found in this case that there had been no "suppression by the prosecution of evidence favorable to an accused." Appendix B, p. 25. The federal circuit court of appeals found that "neutral or no opinion evidence" is not "favorable evidence" within the meaning of the due process guarantees of *Brady* and related cases. Appendix A, p. 19.

These holdings are obviously correct and this Court has previously denied certiorari in comparable types of cases. See for example, *Clarke v. Burke* (7th Cir., 1971), 440 F. 2d 853, cert. den. 404 U.S. 1039, and *State v. Clarke* (1967), 36 Wis. 2d 263, 153 N.W. 2d 61, cert. den. 393 U.S. 861. In both *Clarke* cases the claim was made that there was a *Brady* violation. The state called the victim and another witness to testify. Each of them identified the accused as the rapist. It did not call two other persons, who had been nearby. Neither of these persons could identify the accused as the rapist, but neither of them could testify that he was

not the rapist. All the courts involved found no *Brady* violation because the evidence was not "favorable" to the accused and, further, found that the evidence had not been "suppressed" since the witnesses who did testify mentioned the existence and presence of the other persons near the scene of the crime.

Another comparable case is *Riley v. Sigler* (8th Cir., 1971), 437 F. 2d 258. In that case the clothing of the accused was submitted to the FBI lab for analysis of certain smudges. The state did not allow inspection of the FBI report and it was claimed that this constituted a *Brady* violation. The report merely stated that the smudges were too limited for significant chemical analysis. The report was noncommittal and inconclusive, just as the testimony of Dr. Crowley would have been noncommittal and inconclusive if he had been called to testify by either the state or the defense. The failure to disclose the content of the FBI report was held not to be a violation of *Brady* since that evidence was not "material" and not "favorable to the accused."

3. No opinion evidence is not "material" evidence.

The sole issue during the sanity portion of this trial was whether petitioner was insane at the time he murdered Russell Wirth and shot Mrs. Mary Wirth. There is no way that an expert's inability to form an opinion can be considered material or relevant to the issue of sanity. The only basis on which the expert can be a witness is that he is an expert and *has* an opinion. His reasons for indecision, or his observations and conclusions in reaching his impasse, or his belief that other experts are better equipped than he to express an opinion, become irrelevant and immaterial to the issue in the absence of the formation and expression of an opinion.

Petitioner argues that Dr. Crowley could have testified that, in his opinion, the petitioner was candid and not malingering. This is clearly immaterial when the issue is sanity, not credibility. Further, Dr. Crowley is an expert on mental diseases and not a lie detector or expert on credibility.

Dr. Crowley's testimony was not "material evidence." *Moore v. Illinois* (1972), — U.S. —, 92 S.Ct. 2562, — L.Ed. 2d —; *Clarke v. Burke* (7th Cir., 1971), 440 F. 2d 853, cert. den. 404 U.S. 1039; *Riley v. Sigler* (8th Cir., 1971), 437 F. 2d 258.

The present case, in which the district attorney "suppressed" no evidence and the evidence involved was neither "favorable" to the petitioner nor "material" to the only issue involved, i.e., sanity, affords no opportunity for this Court to explain *Brady*. There is no reason to grant certiorari for that purpose.

II. The Petitioner's Meritless Claims About The District Attorney's Final Arguments Present No Substantial Federal Question And No Reason For Granting Certiorari.

The trial of this case was long, complicated and exhausting. There were final arguments by the district attorney and defense counsel on both the issue of guilt and, over a week later, on the issue of sanity. In this petition for certiorari is found a potpourri of out-of-context words and phrases apparently uttered by the district attorney at various times, on various subject matters and during various of his final arguments. The complaints in the petition about the collected words and phrases are sometimes contradictory, sometimes

silly, and at all times are both legally meritless and incapable of being evaluated as to truth, completeness or effect by this Court, which will not on this requested review have available to it the 3211-page transcript of the trial.

A. The district attorney's final arguments did not even contain prejudicial error.

The final arguments of the district attorney in this case consisted of the opening and closing final argument on the issue of guilt and a final argument on the issue of sanity. Defense counsel did make a few objections during the course of these arguments. Some of these objections were sustained and prompt remedial action taken by the trial court. Others were overruled. At no time, however, did the petitioner's very competent, aggressive and imaginative team of three Wisconsin trial lawyers make a motion for a mistrial, even though that motion is almost automatically made if there is any basis for asserting that a remark of a district attorney was such as to deprive the defendant of a fair trial. In Wisconsin, failure to make a motion for a mistrial before the jury returns with its verdict is a waiver of complaints of impropriety in the final arguments of counsel. *State v. Christopherson* (1967), 36 Wis. 2d 574, 583, 153 N.W. 2d 631; *Price v. State* (1967), 37 Wis. 2d 117, 134, 135, 154 N.W. 2d 222; *State v. Ruud* (1969), 41 Wis. 2d 720, 727, 165 N.W. 2d 153.

On motions after verdict, defense counsel claimed to the trial court that 100 errors had occurred. 47 Wis. 2d 668, 673. Among these was a claim that prejudicial error, *not* a deprivation of due process, had occurred during the final

arguments of the district attorney. The trial court, which is the court in the best position to evaluate claims "in view of the totality of the circumstances," found no merit in this assertion.

On appeal to the Wisconsin Supreme Court it was argued by petitioner that prejudicial error had occurred during the final arguments of the district attorney. It was *not* argued, however, that these alleged errors were so serious and devastating that they denied the petitioner a fair trial and, therefore, due process of the law as guaranteed by the Fourteenth Amendment. The Wisconsin Supreme Court, which had the complete record before it, found that the arguments of the district attorney on the subject of the heinous nature of the crimes and the weaknesses of certain defense arguments fell "well within the outer limits of the leeway given counsel in this area." 47 Wis. 2d 668, 682. On the subject of expressions of opinions by the district attorney, the Supreme Court found that, "If error there was, it was cured" and pointed out that the defense had made no motion for a mistrial. 47 Wis. 2d 668, 682.

After affirmance of his conviction by the Wisconsin Supreme Court and denial of a motion for rehearing, a petition for certiorari was filed with this Court. In it, the petitioner did not even bother to raise either of the "questions presented" in this petition. Certiorari was denied. 402 U.S. 972.

As found by the state courts, the final arguments of the district attorney did not contain any prejudicial error.

B. Even if there had been prejudicial error, however, no federal question is presented unless the petitioner was deprived of a fair trial in violation of his federal constitutional right to due process of the law.

A petition for a writ of habeas corpus was filed by this petitioner with the federal district court. At that juncture the question ceased to be whether prejudicial error occurred during the final arguments of the district attorney and became whether any errors, which did exist, were so serious and overwhelming that the petitioner was thereby deprived of a fair trial and, therefore, of life, liberty or property without due process of law.

The United States Court of Appeals for the Seventh Circuit, in *United States ex rel. Weber v. Ragen* (7th Cir., 1949), 176 F. 2d 579, cert. dism. 338 U.S. 809, 94 L.Ed. 489, 70 S.Ct. 49, held:

> "* * * The United States District Court does not sit in habeas corpus proceedings to review errors of law in the state courts. It sits only to determine whether or not the proceedings in the state court amount to a violation of federal constitutional rights. Lyons v. State of Oklahoma, supra, 322 U.S. 605, 64 S.Ct. 1213, 88 L.Ed. 1481. * * *"

In *Sampsell v. People of State of California* (9th Cir., 1951), 191 F. 2d 721, cert. den. 342 U.S. 929, improper remarks of a state prosecutor in argument to a jury were cited by a *habeas corpus* petitioner as proof that he was being held in custody in violation of the federal Constitution. The court first observed (191 F. 2d at 725):

"* * * The control by this court over criminal trials in state courts is more limited than our review of a criminal proceeding in the federal district courts. Malinski v. New York, 1945, 324 U.S. 401, 411, 65 S.Ct. 781, 89 L.Ed. 1029."

Exercising this limited power of review, the court in *Sampsell* framed the issue to be resolved in the following language:

"The issue in this type of proceeding is not whether the statements of the district attorney deprived petitioner of trial by jury, see Palko v. Connecticut, 1937, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288, but whether his conviction was the result of an unfair trial, Adamson v. California, 1947, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, and therefore deprived him of life, liberty, or property without due process of law. United States Constitution, Amendment XIV, Section 1." (191 F. 2d at 725).

The court, applying the foregoing standard, held that there was "nothing in the ill considered remarks of the district attorney that could move a federal court to hold, *over the judgment of the state Supreme Court,* that the trial was unfair to the point of violating the Fourteenth Amendment to the Constitution of the United States or in violation of any other section of that charter. * * *" (Emphasis supplied.)

In a more recent decision involving a claimed deprivation of constitutional right by virtue of improper argument, the Court of Appeals for the Ninth Circuit elaborated upon the standard to be applied by federal courts in such cases. Having assumed that error had intervened during the course of the state prosecutor's argument, the court in *Chavez v. Dickson* (9th Cir., 1960), 280 F. 2d 727, held, at p. 735:

"But even if such remarks could have been so interpreted, or assuming that the impropriety of the remarks in any other respect had been raised and should have been sustained, no prejudice resulted which has constitutional significance. It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted. Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166. In our opinion the remark of the prosecution quoted in footnote 12 did not result in a denial of fundamental fairness essential to the concept of justice."

United States ex rel. Castillo v. Fay (2d Cir., 1965), 350 F. 2d 400, cert. den. 382 U.S. 1019, involved a claim that a remark of the prosecutor in final argument was a denial of due process. In rejecting this claim that court wrote, p. 401:

"But whatever error the state court may have committed in failing to grant a new trial, the defect in the trial did not attain constitutional proportions. The prosecutor's conduct did not create a situation so prejudicial to appellant that he was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment.

" 'The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question.

" 'As we have recently said, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a

demonstrable reality." ' Buchalter v. New York, 319 U.S. 427, 431, 63 S.Ct. 1129, 1132, 87 L.Ed. 1492 (1943), quoting Adams v. U.S. ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

"Conduct of state prosecutors which it was contended was unfair and prejudicial has consistently been held on collateral attack in the federal courts to fall short of constituting a lack of due process. [citations omitted]."

C. This petitioner was not denied due process of the laws by reason of the content of the district attorney's final arguments.

The federal district court here found that there was no error at all, let alone the overwhelming error required for a violation of the federal guarantee of due process. It wrote:

"* * * I have examined those statements [the allegedly inflammatory and prejudicial statements of the prosecutor before the jury] and agree with the state supreme court's conclusion that the arguments were within the 'limits of the leeway given counsel.' 47 Wis. 2d at page 682, 178 N.W. 2d at page 24." (Appendix B, p. 25, 26).

The United States Court of Appeals for the Seventh Circuit, whose decision is the subject of this request for review, concluded:

"* * * We cannot say, over the judgment of the state Supreme Court and the federal trial court, that these statements were of such gravity as to constitutionally deprive petitioner of a fair trial. *See Sampsell v. People of California*, 191 F. 2d 721, 725 (9th Cir. 1951), *cert. denied*, 342 U.S. 929 (1952)." (Appendix A, p. 20).

The Due Process Clause of the Fourteenth Amendment requires a fair trial, not a perfect one. *Lutwak v. United States* (1952), 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593; *Bruton v. United States* (1968), 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed. 2d 476. This petitioner, as found by the federal courts involved and as recognized by the petitioner's trial counsel, who made no motion for a mistrial and who at no time alleged a violation of due process to the state trial court, the state supreme court or to this Court, was not deprived of the fair trial required by the Due Process Clause because of the content of the district attorney's final arguments. Any errors which did occur were nonprejudicial and had no federal constitutional dimension. No substantial federal question is raised by the petitioner's Argument II.

CONCLUSION

There is no reason for granting certiorari in this case and the petition therefor should be denied.

Respectfully submitted,

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December 8, 1972